

1/30/02

Hearing:  
October 10, 2001

Paper No. 18  
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Michael E. Love

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Serial No. 75/405,215

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Mark Ungerman of Fulbright & Jaworski for applicant.

Ingrid Eulin, Trademark Examining Attorney, Law Office  
111 (Craig Taylor, Managing Attorney).

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Before Walters, Holtzman and Rogers, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Michael E. Love has filed a trademark application to  
register the mark AMERICA'S BAND for "entertainment in  
the nature of live performances by a musical group."<sup>1</sup>

The Trademark Examining Attorney has issued a final  
refusal to register, under Section 2(e)(1) of the  
Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that

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<sup>1</sup> Serial No. 75/405,215, in International Class 41, filed December 15,  
1997, based on an allegation of a bona fide intention to use the mark in  
commerce.

applicant's mark is merely descriptive of his services because it is laudatory.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, and an oral hearing was held. We affirm the refusal to register.

The Examining Attorney contends that the phrase AMERICA'S BAND touts the musical group's superiority, stating that the phrase "compares band services ... and applicant is touted as best." She states that "[t]he term BAND immediately conveys the exact nature of the services and the term AMERICA'S also lacks the requisite level of uniqueness, ingenuity or originality. ... The term merely furthers the laudatory commercial impression that the applicant's band is the best and favorite in all of America." She states that "[t]he Beach Boys gained popularity by exploiting American themes and ideals during a time when music and popular culture were inundated by British performers, including the Beatles."

The record includes excerpts from articles retrieved by the Examining Attorney from the LEXIS/NEXIS database submitted in support of the Examining Attorney's position.<sup>2</sup> The Examining Attorney asserts that the

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<sup>2</sup> The originally assigned Examining Attorney conducted two broad searches of the NEXIS database and placed in the record the entire results of his search, in a summary format. The results include many

articles establish that AMERICA'S BAND "conveys the meaning of favorite or popular"; and that the phrase has been used to refer to a specific band, the Beach Boys, of which applicant was a founding member.<sup>3</sup>

Applicant admits that the term BAND is merely descriptive in connection with his services, but argues that the phrase AMERICA'S BAND is not merely descriptive in connection therewith; that applicant chose the mark "to refer back to a time when the Beach Boys' music celebrated American styles and ideas"; and that the phrase is only suggestive because it "is designed to conjure up feelings of nostalgia for those things truly American, such as apple pie, Chevrolet convertibles, malt shops, California surfing, etc." Applicant contends that "no band is truly America's band"; and that his mark is neither puffery extolling the superiority of his musical

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duplicative articles and the vast majority of articles are entirely irrelevant. All of these articles should have been reviewed and consolidated before submission of a representative sample. Of the relevant articles, there are several that refer to applicant's band by the name "America's Band"; as well as several articles referring to the Beach Boys as "America's Band," and a few articles indicating that the Beach Boys referred to themselves as "America's Band." There is one reference that uses the phrase "America's band" to refer to yet a third musical group, Alabama. Other phrases appearing in excerpts as band names or descriptors, such as "Heartland of America" and "Heritage of America," are not probative of the significance of "America's Band."

<sup>3</sup> The Examining Attorney has not refused registration under Section 2(a) on the ground that the mark creates a false suggestion of a connection with the Beach Boys and, therefore, that issue is not before us and has not been considered.

group nor a laudatory phrase directed to the quality of the group's live performances. Applicant submitted copies of sixteen third-party registrations for marks consisting of the word "America's" followed by a merely descriptive term which is disclaimed (for example, AMERICA'S RESORT, AMERICA'S GUITAR, AMERICA'S ACTION FIGURE, AMERICA'S PHARMACY and AMERICA'S ELECTRONIC BROKERAGE).

With his brief, applicant submitted a copy of a letter to him, dated January 8, 1998, from a company that appears to represent the Beach Boys, although that relationship is not established in the record except by implication. Applicant describes the letter as granting him permission to use the name "America's Band" to refer "to a musical group made up of former Beach Boys members." Whether or not the letter grants such permission is immaterial in this case because neither a Section 2(a) issue, false suggestion of a connection with the Beach Boys, nor a Section 2(d) issue, likelihood of confusion with any trademarks owned by the Beach Boys, is before us in this appeal. The letter is relevant only to the extent that it may relate to the issue of descriptiveness in this appeal.

Applicant states that his mark differs from the marks beginning with AMERICA'S found to be laudatory in *In re Wileswood, Inc.*, 201 USPQ 400 (TTAB 1978) [AMERICA'S BEST POPCORN and AMERICA'S FAVORITE POPCORN]; and *In re Carvel Corp.*, 228 USPQ 65 (TTAB 1984) [AMERICA'S FRESHEST ICE CREAM]. Applicant does not enunciate a specific reason for that asserted difference, although, presumably, it is the fact that applicant's mark does not include an adjective such as "best," "favorite," or "freshest."

The test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality, feature, etc. *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985). Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or

on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. *In re Recovery*, 196 USPQ 830 (TTAB 1977).

We find that the evidence of record supports the conclusion that AMERICA'S BAND is merely descriptive in connection with entertainment in the nature of live performances by a musical group. While the phrase does differ from the cited cases because it does not include an adjective such as "best" or "favorite," the evidence demonstrates clear use of the phrase in a laudatory manner to indicate that certain bands, the Beach Boys and Alabama, are being touted as quintessentially "American." Use of the phrase in such a manner in conjunction with the Beach Boys is further supported by the letter submitted by applicant, wherein applicant is advised that "[i]t must be clearly evident that 'America's Band' is the name of the band and not a description." In other words, the phrase must be clearly asserted by applicant as a purported trademark rather than as the descriptive phrase it is when it is touting the Beach Boys. Based on the evidence, we conclude that AMERICA'S BAND is a merely

descriptive phrase that is not an inherently distinctive trademark for a musical group.

We are not convinced otherwise by the third-party registrations submitted by applicant. Not only do the goods and services differ from the services in this case, but we do not know what evidence was submitted in relation to those applications. Each case must be decided based on the evidence submitted, and facts adduced, in that case.

*Decision:* The refusal under Section 2(e)(1) of the Act is affirmed.